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Supreme Court of the United States

OCTOBER TERM, 1964

No. 1056

EMILIUS AUGUST TJONAMAN,

Petitioner,

against

A/S GLITTRE and FEARNLEY & EGER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS A/S GLITTRE AND FEARNLEY & EGER IN OPPOSITION

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Opinions Below

District Judge Cooper's opinion holding that Norwegian law applied to libelant's cause of action has not been officially reported, but is unofficially reported at 1965 A.M.C. 61. The text of the opinion is set forth on pages 4a-15a of libelant-appellant's appendix in the United States Court of Appeals for the Second Circuit. The further proceedings of May 21, 1963, leading up to Judge Cooper's dismissal of the libel are set forth on pages 17a-21a of libellant-appellant's appendix in the United States Court of Appeals for the Second Circuit.

The opinion of the United States Court of Appeals for the Second Circuit affirming the dismissal of the libel is officially reported at 340 F. 2d 290, and unofficially reported at 1965 A.M.C. 57.

Jurisdiction

Petitioner asserts the jurisdiction of this Court under 28 U. S. Code §1254(1), but fails to show any present conflict between the Circuits or with prior decisions of this Court.

Questions Presented

We do not recognize the facts and the legal issues of this litigation in the two questions presented to this Court on page 3 of the petition.

The sole question presented by this case is whether the Court of Appeals was correct in affirming District Judge Cooper's ruling on the basis of the 10 enumerated paragraphs of stipulated facts that the Norwegian law rather than the general maritime law of the United States applied to petitioner's cause of action. There can be no question raised as to the subsequent dismissal of the libel, because the dismissal was based upon a failure of proof, there having been no proof offered as to the circumstances of the injury or the substantive provisions of the Norwegian law. Accordingly, respondents respectfully suggest that the only question which can be presented in this case is:

Whether, in the absence of a showing of conflict between the Circuits and in the absence of any claim that the result obtained below is in conflict with the prevailing decisions of this Court in *J. Lauritzen* v. *Larsen*, 345 U. S. 571 (1953) and *Romero* v. *International Terminal Operating Co., et al.*, 358 U. S. 354 (1958), this Court should undertake to review the conclusion of the District Judge and the unanimous affirmance of the three Judges of the United States Court of Appeals for the Second Circuit, holding that petitioner had failed to show sufficient factors to justify the application of American law aboard the Norwegian vessel?

Statement

The ten enumerated statements of fact which counsel had agreed should govern the determination of applicable law are set forth on pages 3 and 4 of the petition. Exhibits A and B referred to in paragraph 6 of the stipulated facts are set forth in respondent's appendix to their brief in the United States Court of Appeals for the Second Circuit.

The relevant facts can be paraphrased as follows:

On February 14, 1958 petitioner, a Dutch national born in Dutch Guiana who had become a legal resident-alien in the United States four weeks earlier, joined m/s Ferngrove in New York as a member of the crew. M/s Ferngrove was a Norwegian flag vessel duly registered in Oslo. Respondent A/S Glittre, the registered owner of that vessel, was a Norwegian corporation. Respondent Fearnley & Eger, the managing owner of m/s Ferngrove, was a Norwegian partnership. Petitioner, who had been a member of the Norwegian Seamen's Union for approximately two years, obtained employment on m/s Ferngrove through that Union and the Scandinavian Shipping Office, Inc. Petitioner signed standard-form Norwegian shipping articles at the office of the Royal Norwegian Consulate General in New York, which articles called for employment subject to the rights and duties set forth in the Norwegian law. Petitioner had previously served aboard other Norwegian flag vessels; he had never served aboard any United States flag vessels. Approximately one month later petitioner sustained an injury aboard m/s Ferngrove while that vessel was in West African waters.

It had been agreed further between counsel that the first matter to be decided was what substantive law was to be applied to petitioner's cause of action, that is, whether the general maritime law of the United States and the Jones Act (46 U. S. Code § 688) or the Norwegian law. During the course of the trial petitioner withdrew all

claims to the applicability of the Jones Act and relied solely upon the general maritime law of the United States.

On April 23, 1963, the Trial Judge handed down an opinion holding that Norwegian law applied to petitioner's cause of action. The trial then proceeded to the second stage involving issues of liability, injuries and damages. Petitioner offered no proof on these issues, and the Trial Judge dismissed the libel on May 21, 1963.

Petitioner appealed to the United States Court of Appeals for the Second Circuit from the judgment dismissing the libel. The appeal was argued on October 22, 1964. On January 11, 1965, Circuit Judge Anderson writing for an unanimous Bench affirmed the dismissal of the libel after stating that the Court was in agreement with the Trial Judge's conclusion that Norwegian law was to be applied to the cause of action. The Court of Appeals recognized that the libel had been dismissed for failure of proof and that

> "The sole question presented on this appeal is whether or not the court below was correct in deciding that Tjonaman could not invoke the general maritime law of the United States." (340 F. 2d 291)

Argument

There Is No Conflict of Decision.

The petition does not contain any assertion that the decision of the United States Court of Appeals is in conflict with any decision of this Court, of any U. S. Court of Appeals or the highest Court of any of our 50 States.

Petitioner leads off by quoting from *Stewart* v. *Pacific Steam Navigation Co.*, 3 F. 2d 329 (SDNY 1924) for the proposition that the intent of Congress was to have the Jones Act apply to whatever foreign shipping might

be sailing in competition with American flag vessels. This decision, handed down 29 years before the ruling of this Court in *J. Lauritzen* v. *Larsen,* 345 U. S. 571 (1953), arose out of a motion by the shipowner to set aside service of a summons on the contention that the *venue* provisions of the Jones Act did not provide for an action being brought against a corporation organized outside the United States. This appraisal of Congressional intent was specifically rejected by this Court in *J. Lauritzen* v. *Larsen, supra,* when Mr. Justice Jackson closed the majority opinion at 345 U. S. 593, writing as follows:

> "In apparent recognition of the weakness of the legal argument, a candid and brash appeal is made by respondent and by *amicus* briefs to extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own. We are not sure that the interest of this foreign seaman, who is able to prove negligence, is the interest of all seamen or that his interest is that of the United States. Nor do we stop to inquire which law does whom the greater or the lesser good. The argument is misaddressed. It would be within the proprieties if addressed to Congress. Counsel familiar with the traditional attitude of this Court in maritime matters could not have intended it for us."

Petitioner cites *Bartholomew* v. *Universe Tankships, Inc.,* 263 F. 2d 437 (2 C. A. 1959), cert. den. 359 U. S. 1000 as supporting his arguments. In the *Bartholomew* case the injury occurred within the territorial waters of the United States, the hiring took place in Baltimore, and the plaintiff, although a British West Indian subject, was a New York resident who had gone so far as to file a declaration of intention to become an American citizen. The application of United States law was based not upon the residence of the plaintiff, but upon the basis that the ultimate ownership was in the hands of citizens of the United States. In order to establish the distinction between the

facts in *Bartholomew* and the stipulated facts in this suit it should be sufficient to quote from the decision of the United States Court of Appeals for the Second Circuit as reported at 263 F. 2d 441:

> "Appellant is a Liberian corporation and the Ulysses flew the Liberian flag. But all the stock of the Liberian corporation is held by a Panamanian corporation, and all the stock of the Panamanian corporation is owned by citizens of the United States. All the officers of appellant are American citizens, its principal place of business is in New York City, and it maintains an office in Liberia as a mere formality to comply with the Liberian statutory requirements."

In short, the Liberian flag of the vessel and the nationality of the ostensible owner were in no way reflective of true ownership and control. The decision of the United States Court of Appeals in *Bartholomew* is in line with the comments of Mr. Justice Jackson in *J. Lauritzen* v. *Larsen*, at 345 U. S. 587, when he recognized that a practice had grown among American shipowners to avoid stringent shipping laws by seeking foreign registrations, and that when confronted with such operations our Courts on occasion had pressed beyond the formalities of more or less nominal foreign registration in order to enforce against American shipowners the obligations which our American law placed upon them. In so commenting Mr. Justice Jackson pointed out that such a rule did not apply to the facts of that case, since it appeared beyond doubt that J. Lauritzen was a Dane by nationality and domicile.

In the instant case the stipulated facts leave no room for claims of a runaway flag or a flag of convenience. On the other hand, they show that respondent, A/S Glittre, the registered owner of the vessel, was a Norwegian corporation and the owner of m/s Ferngrove, a Norwegian flag vessel duly registered in Norway. The facts also showed

that respondent, Fearnley & Eger, was a Norwegian partnership and was the managing owner of the vessel.

The headnote on page 9 of the petition does not reflect prevailing law. The case of *Blanco* v. *Phoenix Compania de Navigacion, S.A.*, 304 F. 2d 13 (4 C. A. 1962) does not stand for the proposition stated by petitioner. Petitioner has taken a sentence from page 15 of the opinion and has offered it to this Court as support for the argument that the general maritime law of the United States will intercede, as a matter of public policy, on behalf of any seaman who can establish that the foreign law to which he might be subject would limit what would otherwise have been his rights under our general maritime law. Even a cursory reading of the *Blanco* case indicates that this was not the ruling of the Court. This was a personal injury claim by a Spanish seaman who had been injured aboard a Liberian flag vessel. The contract of employment, that is, the hiring articles, limited the monetary recovery for personal injuries. The question was whether this monetary limitation was valid. The seaman claimed the benefits of the Jones Act and our general martime law, stating that whereas the vessel was ostensibly owned by a Liberian corporation, it was in fact controlled by United States citizens. Interrogatories were addressed to the shipowner in an effort to develop facts with respect to ownership, operation and control. In the face of these interrogatories the owners *admitted* that libelant was entitled to the benefits of the laws of the United States. As a result, the Jones Act and our general maritime law were *ipso facto* applicable to the suit. At that point the restrictive provisions in the hiring articles were stricken by the Court as being against public policy since they ran contra to the provisions of *our* laws. There was no holding in *Blanco* that foreign law was void if it limited or denied the provisions of our general maritime law. Foreign law was not involved in the *Blanco* case, because the shipowner had conceded that the seaman's claims were governed by United States law.

The cases cited on page 11 of the petition are of no value, because in this case the respondents have never contested the jurisdiction of the District Court, sitting in Admiralty, to adjudicate the controversy between the parties on the basis of whatever law the Court might have found to be applicable. The discretionary jurisdiction of the Court sitting in Admiralty has never been in issue. In *J. Lauritzen* v. *Larsen, supra,* at 345 U. S. 591, Mr. Justice Jackson rejected the argument that when an American forum had perfected its jurisdiction over the parties, it should apply its own law to the controversy between them. As he pointed out, the purpose of our conflict-of-laws doctrine was to assure that a case would be treated in the same way under the appropriate law regardless of the fortuitous circumstances which might determine the forum.

The decision of the United States Court of Appeals is plainly not in conflict with the prevailing rules established by this Court in *J. Lauritzen* v. *Larsen,* 315 U. S. 571 (1953), and *Romero* v. *International Terminal Operating Co., et al.,* 358 U. S. 354 (1958).

J. Lauritzen v. *Larsen, supra,* is still the leading authority in the field. The cardinal importance to be ascribed to the law of the flag has more recently been reemphasized in *McCullough* v. *Sociedad Nacional, et al.,* 372 U. S. 10 (1963).

The opinion of the Trial Judge (4a-15a) and the affirming opinion of the United States Court of Appeals for the Second Circuit (340 F. 2d 290) show that more than mere lip service was paid to the decision of this Court in *J. Lauritzen* v. *Larsen, supra,* in arriving at the conclusion that the factors establishing a connection with the United States in suit were insufficient to outweigh the venerable and universal rule giving cardinal importance to the law of the flag, and did not justify the application of American law aboard the Norwegian vessel.

There Is No Important Question of Federal Law.

The only question posed by this case is whether petitioner's month old status as a resident alien in the United States should be sufficient to endow petitioner with rights under the United States laws which substantially all of his shipmates did not have. In researching the problem only one other post-*Larsen* case involving a similar fact situation has been found. *Smith* v. *Furness, Withy & Co., Ltd.*, 119 F. Supp. 369 (SDNY 1953) involved a plaintiff who was a British subject but a resident of the United States. The injury occurred aboard the British vessel in foreign waters. The Court concluded, after applying the factors listed in *J. Lauritzen* v. *Larsen, supra,* that the law of the flag was to be applied. There was no appeal taken from the decision. The only other post-*Larsen* case we have been able to find is *Bartholomew* v. *Universe Tankships, Inc., supra,* where the law of the flag was rejected, not because plaintiff was a resident-alien of the United States, but because the flag did not reflect the true ownership of the vessel. Even if Bartholomew had been a non-resident-alien the decision to apply United States law would still have been compelled because of the domestic ownership, operation and control of the vessel. *Bartholomew* has to belong with "runaway flag" or "flag of convenience" cases.

Twelve years have gone by since the *J. Lauritzen* v. *Larsen, supra,* decision, and there has been only one case even remotely similar to the present one. That was, of course, *Smith* v. *Furness, Withy & Co., Ltd., supra.*

We submit that the matters set forth in the petition do not warrant the time and attention of this Court. A decision by this Court on the merits of the suit can add nothing to the present state of the law. The criteria and the weight to be ascribed to the various factors in determining applicable law in the foreign flag cases have been set forth more than adequately in the existing decisions of

this Court. Our Courts of Appeal have not demonstrated any difficulty in applying those standards. Furthermore, any decision by this Court would have to be limited to the particular stipulated facts of the case and would have little or no value as a future guide to other cases even if we were to assume that the employment of legal U. S. residents aboard foreign flag vessels was prevalent. The dearth of cases on the subject would indicate that the instances are rare indeed.

The Decision Below Is Clearly Correct.

The stipulated facts and the holdings in *J. Lauritzen* v. *Larsen, supra,* compel the conclusion that the Court below was correct in affirming on the grounds that petitioner had failed to show sufficient factors to justify the application of United States law instead of the law of the flag.

Both the Trial Judge and the United States Court of Appeals for the Second Circuit applied meticulously the seven tests which this Court stated in *J. Lauritzen* v. *Larsen, supra,* should be made in order to determine the law to govern a maritime tort claim.

The first test, Place of the Wrongful Act, is on all fours with the facts in *Larsen.* The plaintiff in *Larsen* was injured aboard the vessel in Cuban waters. Petitioner was injured aboard the vessel in West African waters. To the same extent that neither party in the *Larsen* case was urging the applicability of Cuban law, neither of the parties here urges upon the Court the applicability of the laws of Ghana. The holding at 345 U. S. 583, 584 that the test of location of the wrongful act is of only limited application to shipboard torts (reaffirmed in *Romero* v. *International Terminal Operating Co., et al., supra,* six years later) eliminates the significance of this test in deciding the choice of law.

The second factor, Law of the Flag, points strongly to the applicability of Norwegian law. This Court stated at 345 U. S. 584, 585 that the law of the flag was to be given "cardinal importance", and continued by stating that "the weight given to the ensign overbears most other connecting events in determining applicable law." The flag in *Larsen* was Danish and the Danish law was held to be applicable. The flag in the instant suit is Norwegian, and the registered owner and the managing owner of the vessel, the respondents to the suit, were both Norwegian.

There is no factual basis for a finding that the Norwegian flag of m/s Ferngrove was other than a true reflection of the ownership, management and operation of that vessel. The law referred to in the hiring articles (Exhibits A and B to the Stipulation of Facts; 1b) was the Norwegian law. The law referred to in hiring articles has importance as a confirming element when it conforms to what would otherwise be applicable law. It would have no significance if it were inserted in the contract in an effort to *avoid* what would otherwise be applicable law. As stated in *J. Lauritzen* v. *Larsen, supra,* at pages 588-589:

> "We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an expressed provision it would probably have been implied."

The third test listed in *Larsen* was Allegiance or Domicile of the Injured. The question is whether petitioner's status as a one month old resident-alien is sufficient of itself to counteract all the other indicators pointing to Norwegian law. It will be remembered that petitioner was

member of the Norwegian Seamen's Union and that he obtained his employment through Norwegian channels, signing hiring articles in the Royal Norwegian Consulate General in New York on the standard Norwegian form calling for the application of Norwegian law.

Did petitioner's newly-acquired status as a resident entitle him to board m/s Ferngrove carrying with him the general maritime law of the United States indicating that whereas Norwegian law might govern the employer-employee relationship of the other members of the crew, he was to serve aboard subject to the rights, duties and obligations set forth in our laws? We submit that the opinion in *J. Lauritzen* v. *Larsen* answered this question at 345 U. S. 586 by stating:

> "Surely during service under a foreign flag some duty of allegiance is due."

The fourth test is Allegiance of the Defendant Shipowner, and here we could paraphrase the *Larsen* opinion (345 U. S. 588) and state that the utmost liberality in disregard of formality does not support the application of American law in this case, for it appears beyond doubt that this owner is a Norwegian by nationality and domicile. The stipulated facts on the basis of which the choice of law question was decided in the District Court do not permit any contrary conclusion. There is no evidence that either respondent is other than a legitimate Norwegian business entity owning and operating a duly registered Norwegian flag vessel in international commerce.

In arguing to this Court petitioner goes beyond the stipulated facts (pp. 5 and 8 of the Petition) by stating that respondents obviously do a great deal of business in the Port of New York, that New York was the port from which petitioner usually signed on and that respondents

maintained a regular agent in New York for husbanding the vessel. Even assuming the truth of these statements for the sake of argument, they do not alter the basic picture. That m/s Ferngrove, a Norwegian flag vessel, may have been in competition, direct or otherwise, with vessels flying the American flag is not a valid reason for determining the law to be applied as between the Norwegian owner and the members of the crew of that vessel. *J. Lauritzen* v. *Larsen,* 345 U. S. 592-3 (1953). Obviously, the operation of a vessel in international commerce requires that her owners do business in various countries. American flag vessels running in liner services between United States and Scandinavian ports would be exposed to a similar claim with respect to their calls at these Scandinavian ports. We are minded of this Court's caution that:

> "* * * in dealing with international commerce we cannot be unmindful of the necessity for mutual forebearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction." (345 U. S. 582)

Nor can the presence of a husbanding agent in a port of call be a basis for application of local law to events occuring aboard the vessel. To the same extent that American vessels have agents in their foreign ports of call, so do foreign vessels have agents in their U. S. ports of call.

While on the subject of claims totally outside the stipulated facts, we submit that it is not significant that m/s Ferngrove may or may not have been calling regularly at U. S. ports during the course of her international travels. S/S Randa, the vessel involved in *J. Lauritzen* v. *Larsen, supra,* was engaged in a regular cargo liner service between U. S. East Coast and South American West Coast ports. Similarly, s/s Guadalupe, the vessel involved in *Romero*

v. *International Terminal Operating Co., et al., supra,* was engaged in a regular passenger and freight liner service between U. S. East Coast ports and Spain. There was no holding in either case that regular calls of the vessel or the presence of an agent in the United States had any bearing on the choice-of-law decision. The smooth continuity of international commerce by sea requires that every effort be made to have crew matters governed by a constant standard rather than by the inevitable fluctuations and variations which would be imposed by reference to the law of the particular port at which the vessel might happen to be.

The fifth test considered in *Larsen* was Place of Contract, and here there is absolute identity between the *Larsen* facts and the facts of this case. If it did anything, the *Larsen* decision eliminated the place of contract as a substantial influence in the choice between competing laws to govern a maritime tort.

The last two factors, Inaccessibility of Foreign Forum and Law of the Forum, have been commented upon earlier in this brief. Inaccessibility of Foreign Forum is not an element in this case, since respondents have not challenged the discretionary jurisdiction of the Court to adjudicate the suit between the parties. There has been no contention that petitioner should or would have to proceed to Norway in order to have his case adjudicated.

The seventh and last factor, Law of the Forum, is again on all fours with the *Larsen* case and must be eliminated as non-determinative because:

> "Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable." (345 U. S. 591)

We submit that the Court below was correct when it stated that petitioner's status as an alien resident of the United States was insufficient to endow him with rights which substantially all of his shipmates did not have, and that the Court was correct in concluding that petitioner had failed to show sufficient factors to justify the application of American law instead of the law of the flag.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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